



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**SUCCESSION CAUSE NO. 736 OF 2013**

**[FORMERLY NAIROBI HIGH COURT P&A CAUSE 1713 OF 2008 & NYERI HIGH COURT P&A CAUSE 172 OF 2011]**

**RE ESTATE OF ARTHUR IKUA GIOCHE (DECEASED)**

**ESTHER MUTHONI MWANGI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOHN R. GATHAIYA MACHARIA.....DEFENDANT/APPLICANT**

**RULING**

1. The applicant craves an order that a *Deoxyribonucleic Acid* (DNA) test be carried out between him and one Johnson Gioche Mwangi to determine if the latter is a son of Arthur Mwangi Gioche (hereafter *the deceased*).
2. The background is that the respondent claims to have been married to the deceased and sired a son, Johnson Gioche, who is now an adult. The retort by the applicant is three-fold: First, that at the material time, the health of the deceased had so much deteriorated that he was incapable of getting children. Secondly, that the respondent had merely been hired as a helper; and, thirdly, that there was no evidence of any marriage between her and the deceased.
3. The main petition is still pending. I will thus refrain completely from commenting on those matters at this stage.
4. The only live issue arising from the applicant's notice of motion dated 11<sup>th</sup> March 2019 is whether he deserves an order for the DNA examination. He avers that he is a blood brother of the deceased. That makes him an *uncle* to Johnson Gioche. He asserts that the examination "*will conclusively prove the paternity*" of the latter.
5. The application is opposed by the plaintiff and her son vide two affidavits sworn on 7<sup>th</sup> February 2020 and 13<sup>th</sup> November 2020 respectively. The plaintiff contends that the motion is a fishing expedition only meant to delay justice. Her son, Johnson Gioche, avers that he is prepared to take the test but only between him and the deceased.
6. There is no doubt that the Court is imbued with power to order a DNA test where a proper foundation is laid. See generally *In re Estate of PWM (Deceased)* High Court, Machakos, Cause No. 974 of 2013 [2016] eKLR.
7. In the instant case, the DNA test *may* help to unravel the relationship between the deceased and Johnson Gioche Mwangi which is *material* to the succession dispute. However, the applicant is an *uncle* to the deceased. Although he asserts that they were born of the same mother and father, the DNA test *may* be useful evidence but *not* necessarily conclusive of the paternity issue. Learned counsel for the applicant, *Mr Gitonga*, conceded as much.
8. On the other hand, I find that it is self-serving for Johnson Gioche to insist on a test between him and the deceased. It is not lost on me that the deceased died over twenty years ago; to be exact, on 12<sup>th</sup> January 2001. I take judicial notice of the costs and procedures attendant to exhumation of his remains.
9. In the interests of justice, I will thus order as follows-
  - (a) That a *Deoxyribonucleic Acid* (DNA) test be carried out between John R. Gathaiya alias John Gathaiya Gioche and Johnson Gioche Mwangi to determine any relationship between the latter and the deceased, Arthur Mwangi Gioche.
  - (b) That the test shall be carried out by either the Government Chemist or the Kenya Medical Research Institute. An original copy of the report shall be filed in court as soon as practicable.

(c) That all the costs of carrying out the test shall be borne wholly by the defendant/applicant.

(d) I make no further order on costs.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG'A this 6<sup>th</sup> day of July 2021.**

**KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:***

Mr. Mikwa holding brief for Mr. Gitonga for the defendant/applicant instructed by M. M. Gitonga & Company Advocates.

Mr. Mwaniki for the plaintiff/respondent instructed by Mwaniki Warima & Company Advocates.

Johnson Gioche Mwangi (in person) present.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.